

1 STATE OF NEW HAMPSHIRE

2 SUPREME COURT

3 UNION LEADER CORPORATION, ) Supreme Court Case No.  
4 Petitioner, ) 2000-0621  
5 vs. )  
6 STATE OF NEW HAMPSHIRE, ) Concord, New Hampshire  
7 Respondent. ) January 17, 2002  
8 \_\_\_\_\_ )  
9 )

ORAL ARGUMENTS

10 BEFORE THE HONORABLE CHIEF JUSTICE JOHN T. BRODERICK, JR.  
11 HONORABLE CHIEF JUSTICE LINDA S. DALIANIS  
12 HONORABLE ASSOCIATED JUSTICE JAMES E. DUGGAN  
13 JUSTICES OF THE SUPREME COURT

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22 Audio Operator: Electronically Recorded  
23 \*\*Not Monitored\*\*

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1                   (Proceedings commenced)

2                   JUSTICE BRODERICK: (Audio begins mid-sentence) --

3 621, this is Union Leader Corporation.

4                   Now, Chief Justice Ross' decision, it says that this  
5 matter will participate in the (indiscernible) of the case.

6                   MR. SULLIVAN: Your Honor and to the Court,  
7 (indiscernible) for the Union Leader Corporation. I'm  
8 grateful for the opportunity to present our likings on this to  
9 the Court. (Indiscernible) to briefly, the State of New  
10 Hampshire, the issue seemed to be simplified to the question  
11 of whether or not under the federal and state constitutions,  
12 the meetings of the superior court justices are subject to  
13 public access. And if so, whether or not the reasonable  
14 limitations placed on all other public records could be placed  
15 on the records generated from the meetings of the superior  
16 court justices. And I submit to the Court that the simple  
17 answer to that question is yes.

18                   This is not an absolute right but rather a very  
19 important constitutional right that is subject to review on a  
20 case-by-case basis. At minimum, the superior court, having  
21 admitted that there were documents that were responsive to the  
22 request to the Union Leader Corporation relative to a meeting  
23 of the chief judges in 1987, should be required to submit  
24 these records to this Court for an in-camera inspection.

25                   The State has alleged that the records need not be

1 disclosed because they relate to pending personnel matters.  
2 And I find that inconsistent with logic, that in calendar year  
3 2001 they're suggesting the records generated in 1987 can be  
4 withheld because they contained pending personnel matters.

5           If indeed there are materials within the records  
6 that contain information that, if disclosed, would constitute  
7 an unwarranted invasion of privacy, the Court is well aware of  
8 the remedy of the redaction that's been utilized to make those  
9 records appropriate for public disclosure. All of the other  
10 considerations that this Court has taken into account, any  
11 public access in right-to-know cases can be taken into account  
12 in these cases if there are trade secrets. Of course, that  
13 would not be the case here or matters of public safety or  
14 matters of privacy, those matters can be culled and redacted,  
15 and the remaining records disclosed to the public.

16           I can envision no set of circumstances where at  
17 least Part 1, Article 8 of the New Hampshire Constitution  
18 would not give the public the right to have the records  
19 requested. The facts of this case contain only two letters:  
20 one from the Union Leader Corporation saying will you provide  
21 us some copies of the agendas and the minutes of the meetings  
22 of the superior court in 1987, and a letter coming back on the  
23 same day from the legal counsel of the administrative office  
24 of courts saying, the minutes -- strike that. "The meetings  
25 to which you refer are not public proceeding but are

1 governmental administrative meetings held for the purpose of  
2 discussing the day-to-day business of the fundament of the  
3 superior court."

4 JUSTICE DUGGAN: Mr. Sullivan, are you aware of any  
5 other appellate decisions that have dealt with access to  
6 conferences among judges that did not relate to the  
7 adjudication of cases, administrative conferences like this?  
8 Is there any other appellate court that's ever dealt with  
9 this?

10 MR. SULLIVAN: I believe in my brief, Your Honor, I  
11 did cite a couple of cases that are at least analogous. One  
12 would be the Schweikert case from Ohio where the documents at  
13 issue were called by the State the work product of the court  
14 administrator and those documents were reported to be  
15 disclosed.

16 JUSTICE DUGGAN: Were they produced by judges, or  
17 were they produced by something like the administrative  
18 officer of the court?

19 MR. SULLIVAN: Probably, and I'm not positive, but I  
20 would suggest that the court did write they were the product  
21 of the court administrator. However, I would suggest that it  
22 would be worth to (indiscernible) regularly with the justices  
23 of that court.

24 JUSTICE BRODERICK: Mr. Sullivan, in your petition  
25 filed with the court, you cite only to Part 1, Article 8 of

1 the state constitution. And your conclusion says, "The public  
2 right of access to records of governmental proceeding". So I  
3 assume that's -- that's what we're looking at here, Part 1,  
4 Article 8 of the state constitution.

5 MR. SULLIVAN: I believe that the inquiries go no  
6 further than that for the court to reach the appropriate  
7 conclusion.

8 JUSTICE BRODERICK: Now, let me ask you this. What  
9 about a meeting of judges in a nonadjudicatory sense, and not  
10 leading to adjudicate cases, makes those meetings governmental  
11 proceedings under the constitution? Could you help me with  
12 that?

13 MR. SULLIVAN: I'm sorry. You were asking me a  
14 question?

15 JUSTICE BRODERICK: We have judges who are meeting  
16 for nonadjudicative purposes, you would agree with that.  
17 They're not there to decide a case.

18 MR. SULLIVAN: They're not there to decide a case.

19 JUSTICE BRODERICK: All right.

20 MR. SULLIVAN: I would agree with that.

21 JUSTICE BRODERICK: Now, I'm curious what it is  
22 about that meeting that would make it under your argument here  
23 a governmental proceeding.

24 MR. SULLIVAN: Well, I'm obviously arguing under the  
25 handicap that I've never attended one of these meetings, but I

1 would suggest that the court and members of the court know  
2 full well, I believe, exactly what those are in those  
3 meetings. But if the judges are talking about their job of  
4 public business, they are then governmental proceedings.

5 JUSTICE DUGGAN: How about in this court, the judges  
6 are talking about pending legislation and what position  
7 they're going to take on it or their views on it; is that an  
8 open meeting?

9 MR. SULLIVAN: Is that an open meeting?

10 JUSTICE DUGGAN: Right. Do they have to invite the  
11 public to attend, and do they have to keep minutes and tell  
12 people what happened at that meeting?

13 MR. SULLIVAN: Well, you're asking me now whether or  
14 not this case should be decided, I think, under the  
15 right-to-know law.

16 JUSTICE DUGGAN: No, I meant under the constitution.  
17 Because we're restricted to Article 8 here, aren't we? Part  
18 1, Article 8?

19 MR. SULLIVAN: No. Well, you're asking me to take  
20 these facts and apply those to the definitions under 91-A. If  
21 we leave it under the department of Article 8, which I think  
22 is the appropriate focus --

23 JUSTICE DUGGAN: Yup.

24 MR. SULLIVAN: -- then to me, there's no question if  
25 minutes -- if agendas are created and if minutes are created,

1 then, yes, there's no question about it, but that those  
2 records should be accessible to the public.

3 JUSTICE BRODERICK: Well, Part 1, Article 8 talks  
4 about access to the governmental proceedings and records,  
5 right?

6 MR. SULLIVAN: Yes.

7 JUSTICE BRODERICK: Now, I want to ask you, if the  
8 governor of the state meets as she may from time to time with  
9 her senior staff in her office to talk about the affairs of  
10 the state, is that a governmental proceeding so that all  
11 agendas and all minutes that the governor's staff might create  
12 are open to the public review?

13 MR. SULLIVAN: Yes.

14 JUSTICE BRODERICK: And if it's a governmental  
15 proceeding, I assume the public should be able to sit in on  
16 those meetings in the governor's office or sit in at the  
17 superior court or sit in at this court because they are  
18 governmental proceedings which by the very nature should be  
19 open.

20 MR. SULLIVAN: I agree with you.

21 JUSTICE BRODERICK: So the governor should hold her  
22 staff meeting in a large room so that the public can attend?

23 MR. SULLIVAN: Well, I think the law provides for if  
24 indeed the effective argument and judiciary determines that  
25 the proper functioning and discussion of those affairs should

1 be done in a private setting, then they can go into what I  
2 will term to your question exactly says, and that --

3 JUSTICE BRODERICK: So would the governor's meetings  
4 with her senior staff, although a governmental proceeding, be  
5 entitled to be held in an executive session?

6 MR. SULLIVAN: Yes.

7 JUSTICE BRODERICK: Why?

8 MR. SULLIVAN: If -- if indeed --

9 JUSTICE BRODERICK: It's a governmental proceeding.

10 MR. SULLIVAN: Right. But if they are formulating  
11 flawlessly, we feel that the open and frank exchange of ideas  
12 between the executives and the staff would be fostered by  
13 excluding the public from those discussions. That's what  
14 meeting executive sessions are designed to --

15 JUSTICE BRODERICK: Well, if you --

16 MR. SULLIVAN: -- accomplish.

17 JUSTICE BRODERICK: If you use that test, the  
18 legislature will have to lock its doors because that's what  
19 they do over there. They discuss policy and public  
20 proceedings and governmental proceedings. They're open.

21 MR. SULLIVAN: If you --

22 JUSTICE BRODERICK: If you take the test you just  
23 applied, they'll put a padlock on the door.

24 MR. SULLIVAN: I'm -- I'm in favor of, obviously,  
25 open government. What I'm suggesting is if the governor or if

1 the members of a particular judicial body determine that  
2 because of the nature of a particular discussion it needs to  
3 be done in private, they're discussing, for example, a  
4 particular transaction or the hiring and firing of a  
5 particular individual, matters that require frank and open  
6 discussion that would impinge on some other employee,  
7 governmental interest such as the privacy --

8 JUSTICE BRODERICK: What if three judges get  
9 together at lunch to talk about the court system and the  
10 policies the court systems have? Is that a governmental  
11 proceeding?

12 MR. SULLIVAN: No, I think that you're entitled to  
13 have lunch.

14 JUSTICE BRODERICK: No, I didn't ask you that.

15 MR. SULLIVAN: When you --

16 JUSTICE BRODERICK: Let's -- for the sake of my  
17 question, we won't have lunch. We just decide to get together  
18 at 10:00 one morning, the three judges on this court before  
19 you, to talk about policy issues, legislative issues, a number  
20 of issues. And Judge Dalianis decides to take notes. Is that  
21 a governmental proceeding? And if not, why not?

22 MR. SULLIVAN: I say it is.

23 JUSTICE BRODERICK: So any meetings of any members  
24 of any branch of government, however large or small, however  
25 official or unofficial, are governmental proceedings by the

1 mere fact that those people serve in government?

2 MR. SULLIVAN: The cases talk about casual meetings  
3 not convened, and they also -- and in 91-A in my analogy talks  
4 about quorums, and I think that may be a relevant factor for  
5 when courts are deciding this case on a case-by-case basis.  
6 Is it a casual informal meeting, or was it like the meeting  
7 we're talking about here, convened formally and constituting  
8 not merely a quorum, but the vast majority of the judges of a  
9 particular body?

10 JUSTICE BRODERICK: If the three judges in front of  
11 you get together every Tuesday over coffee to talk about the  
12 court, the policies of the court, the reaction and  
13 inter-relationship among and between the branches of  
14 government, should we notice that meeting so that people could  
15 come if they'd like? If it's a governmental proceeding, it  
16 should be open, shouldn't it?

17 MR. SULLIVAN: If it's a governmental proceeding, it  
18 should be open.

19 JUSTICE BRODERICK: So how would we notice that? Or  
20 should we not meet, I guess? How would we --

21 MR. SULLIVAN: You should meet. I don't think  
22 notice is required. You're trying to pigeonhole the facts of  
23 that meeting to the right-to-know law.

24 JUSTICE BRODERICK: No, I'm not. I'm trying to deal  
25 with Part 1, Article 8 of the constitution, how this will

1 work. So that if, for instance, you were to call the court  
2 every day saying when are the judges getting together over  
3 coffee because I'd like to come up and sit in, you would say  
4 that we would have to say, sure, this is the time we're  
5 meeting; happy to have you sit in.

6 MR. SULLIVAN: I'm not saying that. I'm saying that  
7 if you have that meeting and you have an agenda and you have  
8 minutes and I request the agenda and the minutes, those should  
9 be disclosed.

10 JUSTICE BRODERICK: So you're -- I'm sorry.

11 JUSTICE DUGGAN: Is it your view that the  
12 restrictions or rather the exclusions in the right-to-know law  
13 apply to Part 1, Article 8?

14 MR. SULLIVAN: When you say, apply to Part 1,  
15 Article 8 --

16 JUSTICE DUGGAN: Well, it's -- Part 1, Article 8  
17 says, "Public right of access to governmental proceedings and  
18 records shall not be unreasonably restricted."

19 MR. SULLIVAN: Yeah.

20 JUSTICE DUGGAN: So it may fall upon us to determine  
21 what's unreasonable. Can we look to the exclusions of the  
22 right-to-know law, that's the legislature to come to maybe as  
23 an interpretation of Part 1, Article 8 say, Part 1, Article 8  
24 applies and these exclusions apply constitution -- not just  
25 statutorily but constitutionally as well?

1 MR. SULLIVAN: Yes.

2 JUSTICE BRODERICK: Do you think that's between  
3 meeting of people in government and governmental proceedings?  
4 And if so, what is the distinction?

5 MR. SULLIVAN: Well, I think there are informal,  
6 casual meetings that if the governor bumps into a mayor at a  
7 social function and they talk, I don't consider that to be a  
8 governmental proceeding.

9 JUSTICE BRODERICK: But if the governor -- go back  
10 to my question, because I want to find out where you stand on  
11 this. If the governor meets with her senior staff behind  
12 closed doors to discuss political issues, policy issues,  
13 governmental issues, the time of day and agendas are prepared  
14 and minutes are kept for their internal use, those are  
15 immediately available or should be to the general public?

16 MR. SULLIVAN: Yes.

17 JUSTICE BRODERICK: And if that's true, how long do  
18 you think those meetings will go on?

19 MR. SULLIVAN: Forever, I hope.

20 JUSTICE DUGGAN: I asked you earlier about case law,  
21 appellate courts that may have dealt with this issue. Are you  
22 aware of any state that has any statute or rules regarding  
23 access to nonadjudicative meetings among judges?

24 MR. SULLIVAN: No.

25 JUSTICE DUGGAN: The federal statute under the

1 Freedom of Information Act would exclude it; is that right?

2 MR. SULLIVAN: That's right.

3 JUSTICE DUGGAN: And are there a lot of states that  
4 have adopted that exclusion as a matter of state law?

5 MR. SULLIVAN: I didn't find a lot of states. I did  
6 find that the State of New York did do that. And that they  
7 excluded -- just like federal statute, they excluded from  
8 their right-to-know statute, but that's not to say they do or  
9 do not have the constitutional strength that we in New  
10 Hampshire have under Part 1, Article 8.

11 JUSTICE DUGGAN: Is our constitutional provision  
12 unique?

13 MR. SULLIVAN: I don't think it's unique, but I  
14 think it's -- it shows the commitment that the founders and  
15 subsequent leaders of the government in New Hampshire have  
16 made to make the government accessible to the public.

17 I'd like to leave the Court with a thought in re  
18 Snow's Case. This Court quoted Thomas Jefferson saying,  
19 bottom line, "A man cannot be trusted with the government of  
20 himself."

21 JUSTICE BRODERICK: Counsel, let me ask you one  
22 question, maybe two before you sit down. Would you define for  
23 me what a governmental proceeding is? Give me a working  
24 definition that you would like us to adopt.

25 MR. SULLIVAN: For the purposes of this case, I

1 would say when a quorum of superior court justices or a  
2 greater number than a quorum of the superior court justices  
3 get together to discuss governmental business, that's a public  
4 proceeding.

5 JUSTICE BRODERICK: And under that definition and in  
6 this case, would it also be your view that absent  
7 extraordinary circumstances any member of the public should be  
8 welcome to sit in in those meetings?

9 MR. SULLIVAN: Yes.

10 JUSTICE BRODERICK: Thank you.

11 MR. SULLIVAN: The Court -- what I want to leave the  
12 Court with is not a court law but from Jefferson in the Snow's  
13 Case, but rather I think a later and more enlightened quote  
14 from Jefferson is on point for this case. He said,

15 "I know of no safe depository of the ultimate powers  
16 of the society but people themselves. And if we  
17 think them not enlightened enough to exercise their  
18 control with a wholesome discretion, the remedy is  
19 not to take it from them, but to inform their  
20 discretion by education."

21 Do I think the public should be privy to discussions  
22 of the support court justices? By all means, Your Honor.  
23 Thank you.

24 JUSTICE BRODERICK: Thank you.

25 MR. MULLEN: Good morning, Your Honor. May it

1 please the Court, my name is Daniel Mullen, and I am here on  
2 behalf of the State of New Hampshire in this matter. The  
3 issues in this case are whether or not the public has a right  
4 to access in the -- any records that are kept of what I'll  
5 term staff meetings of the superior court judges that are held  
6 on a regular basis.

7                 The Petitioner in this case, Union Leader, has made  
8 three arguments as to why the public should be granted access.  
9 I will go through two of them quickly because I think the  
10 third one is the other part (indiscernible) in detail.

11                 The first argument made by the Petitioner is that if  
12 the person has the right to access -- be entitled to these  
13 records. We argued in our brief, and it's fairly simple that  
14 the First Amendment only provides public access to  
15 adjudicative court proceedings, and this does not fall under  
16 that or anything -- argument regarding (indiscernible) and  
17 shouldn't be considered by the Court.

18                 The second argument made by Union Leader is that our  
19 opinion 91-A applies to these types of proceedings. First of  
20 all, as Justice Broderick pointed out, we believe that they  
21 only appealed on the basis of Part 1, Article 8 in a way  
22 regarding (indiscernible).

23                 Secondly, we believe that the definition of a public  
24 law-abiding body in RSA 91-A does not include the branch of  
25 government very specifically, including the appellate court,

1 it includes the ward of state governments, and include the  
2 commissioning boards of (indiscernible) what is governing the  
3 state. It specifically does not mention the legal branch at  
4 all. And that means the legal branch is not subject in any  
5 way and that any analysis of that activity is brought forth.

6 Which brings me to the third argument, which is  
7 whether or not these records are records of governmental  
8 proceedings that the public should have action to in court.  
9 It's not been briefed in (indiscernible). Our argument is  
10 that they are not records. First of all, that they are not  
11 government proceedings, I agree with the Court  
12 (indiscernible).

13 JUSTICE DALIANIS: Why not?

14 MR. MULLEN: We believe that governmental  
15 proceedings are -- and I look to guidance, Your Honor, in  
16 91-A, the definition of public review in 91-A and 1-A, one of  
17 those two, I cited it in the beginning notes of our brief. We  
18 believe that has the provision that may affect the public.  
19 Here, the -- are not a transaction of this; they are  
20 discussions of issues. But the superior court judges sitting  
21 together and meeting have no ability as superior court judges  
22 to make decisions or to transact business that would affect  
23 the public.

24 JUSTICE DALIANIS: How do you know?

25 JUSTICE DUGGAN: How about if they --

1 JUSTICE DALIANIS: How do you know?

2 MR. MULLEN: Based upon my quick review of the  
3 minutes that I read at the time, Your Honor.

4 JUSTICE DALIANIS: Never mind, I sat through those  
5 meetings for 20 years.

6 MR. MULLEN: I understand, you probably have a much  
7 better perspective on them than I do. I looked very briefly.

8 JUSTICE DALIANIS: They were mostly just boring,  
9 but --

10 MR. MULLEN: But --

11 JUSTICE DALIANIS: -- that aside.

12 MR. MULLEN: -- very quickly I looked at the minutes  
13 of the meetings and I did not -- they were in frank open  
14 discussions of issues that may be of interest to the chief  
15 administrative judge.

16 JUSTICE DUGGAN: What if they discuss a rule?

17 MR. MULLEN: They may discuss a rule, but a court --  
18 the judges themselves have no ability to redact or make a  
19 final decision on the ruling.

20 JUSTICE DUGGAN: But that --

21 MR. MULLEN: They have the ability to recommend to  
22 this court that a certain rule might be adopted.

23 JUSTICE DUGGAN: But can it be a proceeding without  
24 reaching a decision? I mean, proceeding doesn't necessarily  
25 mean it has to be a decision --

1 MR. MULLEN: I --

2 JUSTICE DUGGAN: -- at the end of the conversation.

3 MR. MULLEN: I agree with you. I agree with you.

4 JUSTICE DUGGAN: So if they discuss a rule, it's a  
5 proceeding.

6 MR. MULLEN: I don't know if I -- I don't know about  
7 transactions, Your Honor. I mean --

8 JUSTICE DALIANIS: Suppose the court in the midst of  
9 one of these meetings decided that, in an effort to approach  
10 uniformity concerning a particular procedure, came up with a  
11 policy to do that and put it in place here in the superior  
12 court location. Wouldn't that be a business that could affect  
13 the public or not?

14 MR. MULLEN: That could affect the public, but I  
15 don't think the court and judges getting together or not.  
16 Again, I don't know. I mean, I've never attended a meeting  
17 where you do that. I think they get together, and in my  
18 opinion, approach that meeting for a decision on an  
19 administrative judge and perhaps come up with rules and  
20 recommend it to the Supreme Court.

21 JUSTICE DALIANIS: No, I'm talking about a different  
22 scenario. I agree, but as to the rule the superior court can  
23 be used to make a recommendation. But the superior court  
24 could say, for example, there will be a particular information  
25 sheet set out at the clerk's office in every superior court to

1 explain a particular procedure so as to make sure that it's  
2 uniformly applied, and it was.

3 Well, they can do that without asking anybody else's  
4 permission, and it seems to me that that might well be the  
5 transaction business that affects the public. No?

6 MR. MULLEN: My understanding of it, and I could be  
7 wrong, is that the judges themselves wouldn't do that. I do  
8 not know. I think the chief administrative judge sitting in  
9 can get input from the judges, contemplated and then decide,  
10 yes, that's a good idea. I was talking to all the superior  
11 court judges. I, as the chief administrative judge, am going  
12 to institute this rule on behalf of the superior court. It is  
13 not the judges sitting as a body, one body through that  
14 business. It's the chief administrative judge keeping invoice  
15 from the rest of the superior court judges sitting here.

16 JUSTICE DUGGAN: What difference does it make how  
17 many -- who decides it at the end of the meeting? As long as  
18 they're discussing something that has the impact on the  
19 public.

20 MR. MULLEN: I (indiscernible) to the governor of  
21 this new statute. The governor makes the decisions, not  
22 the staff. The governor seeks the input from them and  
23 contemplates that (indiscernible).

24 JUSTICE DUGGAN: If --

25 MR. MULLEN: And says, okay, this is mine and says,

1 yes, I'm going to (indiscernible) and go another way. I now  
2 have the chief administrative judge in the superior court  
3 doing the same thing, I mean (indiscernible) that's the issue.

4 JUSTICE DUGGAN: What if you -- I'm sorry.

5 MR. MULLEN: As a result he makes the judges -- the  
6 chief administrative judge makes the decision based upon  
7 input, but it's not -- not -- there's no veto power of the  
8 superior court judges. All 16 of them may attend a meeting,  
9 maybe they can't make it a policy without the administrative  
10 judge for whatever reason, it's a good policy. He couldn't  
11 (indiscernible) --

12 JUSTICE BRODERICK: Mr. Sullivan --

13 MR. MULLEN: -- that policy as a rule.

14 JUSTICE BRODERICK: Mr. Sullivan told me that in his  
15 view a meeting of a governor and a senior staff, if they have  
16 minutes and agendas, would be governmental proceedings. And  
17 start with that assumption under Part 1, Article 8. Would you  
18 agree with me that under the right-to-know law, those meetings  
19 would not be public?

20 MR. MULLEN: I agree with you, Your Honor,  
21 because --

22 JUSTICE BRODERICK: All right. And if that's a  
23 correct statement under the law, 91-A, in fact what the  
24 legislature did is to enact the law that's more restrictive  
25 than the constitution would allow.

1                   MR. MULLEN: If you accept Mr. Sullivan's --

2                   JUSTICE BRODERICK: I accept Mr. Sullivan. The  
3 legislative has decided to put behind a curtain that which  
4 Part 1, Article 8 says should be a public or governmental  
5 proceeding.

6                   MR. MULLEN: Then you have to (indiscernible) --

7                   JUSTICE BRODERICK: Now, let me ask you this. When  
8 the attorney general of this state meets with his senior  
9 staff, which I assume he does, to talk about issues of policy  
10 and procedure, do you view those as -- where decisions are  
11 presumably made about how that office should be run and how  
12 people should comport themselves, and what policies they want  
13 to adopt, he does that in his office every Tuesday morning in  
14 my hypothetical. Do you view those as governmental  
15 proceedings under Part 1, Article 8?

16                  MR. MULLEN: I do not. I agree with  
17 (indiscernible).

18                  JUSTICE BRODERICK: And would you agree with me if  
19 they were, we should invite the public? I mean, governmental  
20 proceedings with rare exception are open to the public.

21                  MR. MULLEN: That you --

22                  JUSTICE BRODERICK: That the attorney general should  
23 hold those meetings in a large room?

24                  MR. MULLEN: If they are governmental proceedings, I  
25 agree that they wouldn't fall under 9 -- not only under Part

1, Article 8, I think they would fall under 91-A and we would have to notice them and probably have a bigger room on some occasions, and provide an agenda for the (indiscernible).

4 JUSTICE BRODERICK: Governmental proceedings,  
5 whatever it means, has to mean something more than transacting  
6 business. It has to be bigger than that because business is  
7 transacted every day in the speaker's office, in the  
8 governor's office, in the attorney general's office, in the  
9 clerk's office, in the chambers of the court.

10                   MR. MULLEN: I -- I agree with you, Your Honor. And  
11 I think, again, using 91-A as guidance, the definition of  
12 transaction of business affects the public by, and then it  
13 goes on, public law which is then further defined. And it's  
14 those public laws are orders and issues, the governor with the  
15 counsel or legislator.

16 JUSTICE BRODERICK: 10 or 12 members of the superior  
17 court do not constitute a public body.

18 MR. MULLEN: I agree.

19 JUSTICE BRODERICK: They constitute 10 or 12 people  
20 who serve in government.

21 MR. MULLEN: Just -- just as the senior staff of the  
22 attorney general's office constitutes roughly five or six  
23 members of the government meeting with the attorney general.  
24 They are not in and of themselves a public body that  
25 creates -- I agree with you. They do those transaction

1 everyday, Your Honor, all three branches.

2 JUSTICE DALIANIS: So can a principal distinction be  
3 made then between an administrative meeting and a public  
4 proceeding even if a straight meeting is conducted by a person  
5 in government?

6 MR. MULLEN: I think there can be, and it should be.  
7 A public proceeding is something where the public can attend,  
8 may very well have input on several occasions where the  
9 administrative, they'll facilitate (indiscernible) of  
10 government.

11 JUSTICE DUGGAN: Are you aware of any cases that  
12 deal with administrative meetings of judges or meetings  
13 between governor and senior staff, attorney general and senior  
14 staff? Are there any -- is there any -- are there any  
15 appellate cases on this?

16 MR. MULLEN: I've spent the last two days, Your  
17 Honor, trying to find another jurisdiction dealing  
18 specifically with staff meetings --

19 JUSTICE DUGGAN: Right.

20 MR. MULLEN: -- executive briefings, and there were  
21 no cases, and I wasn't able to find any.

22 JUSTICE DUGGAN: One way or the other.

23 MR. MULLEN: One way or the other.

24 JUSTICE DUGGAN: What do you view is the  
25 relationship between the exclusions in the 91-A and the

1 unreasonableness clause of the Part 1, Article 8?

2 MR. MULLEN: I think the exclusions are the life  
3 blood of this judgment as to what is reasonable on access to  
4 the government opportunities.

5 JUSTICE DUGGAN: How should we use those exclusions  
6 if we reach the issue as what is an unreasonable restriction  
7 under Part 1, Article 8? What should those -- should those --  
8 should those exclusions be guidance or binding on us as a  
9 matter of interpretation of that section of the constitution?

10 MR. MULLEN: I think they can be guidance. I  
11 wouldn't say binding on. As a matter of fact, I would argue  
12 that there are more reasonable restrictions in Article 18 in  
13 91-A that this Court could use. For instance, basically the  
14 Court is taking a good (indiscernible) and comment and a grasp  
15 as a blanket exception to not -- should not be excluded under  
16 the Federal Freedom of Information Act of this specific  
17 provision.

18 They can -- I do not think that the Court decides  
19 that would be an unreasonable restriction, not to contain  
20 91-A, but other jurisdictions that very well could be  
21 (indiscernible) in Article 8. So I think the exclusion  
22 contained in 91-A could lead this Court for guidance on -- not  
23 necessarily restrictions to be bound only by those, but they  
24 could be (indiscernible).

25 JUSTICE BRODERICK: I want to ask you this. Under

1 Part 1, Article 8, you would agree that's the only issue  
2 that's before us?

3 MR. MULLEN: I agree, Your Honor. I think the other  
4 two articles are not.

5 JUSTICE BRODERICK: It talks about access to  
6 governmental proceedings and records. And my question is, is  
7 records broader than governmental proceedings? In other  
8 words, are the records that are referred to in the  
9 constitution only records of governmental proceedings? Or are  
10 they records that could not pertain to governmental  
11 proceedings but had been generated by somebody in government,  
12 therefore making it a governmental record?

13 MR. MULLEN: I think it could, Your Honor, but I  
14 think we have guidance on that. I think it could be broader  
15 just as there are records of briefs that are not generated as  
16 a result of the public (indiscernible) but certainly call the  
17 documents that have been produced in 91-A.

18 JUSTICE BRODERICK: To go back, if the attorney  
19 general meets with his senior staff and there's an agenda and  
20 there are minutes kept, you say to me the staff meeting is not  
21 a governmental proceeding. But my question is with regard to  
22 Mr. Sullivan's concern, why aren't the agendas and the  
23 minutes, however, governmental records --

24 MR. MULLEN: We --

25 JUSTICE BRODERICK: -- that can be disbursed to the

1 public?

2 MR. MULLEN: We -- I'll take a broad definition. I  
3 think any records -- the definition could be any records  
4 generated by persons working in government could be considered  
5 governmental records, as a broad base. Then the question is  
6 whether or not -- and I mean, we assumed in our brief for  
7 purposes of this argument that the records generated by the  
8 superior court judges, records that were governmental records.  
9 Then we want to argue that they were reasonable on access. I  
10 don't think that the government -- the term governmental  
11 records becomes a broader --

12 JUSTICE BRODERICK: Okay. To go to my hypothetical  
13 now, what restriction would we impose to say the attorney  
14 general's senior staff agendas and minutes should not be made  
15 available to the Union Leader?

16 MR. MULLEN: As a general proposition as we  
17 discussed in our brief, I'll refer to withdrawing a  
18 governmental privilege. There is verified the executive  
19 privilege and information privilege. I believe it goes to the  
20 deliberate process and encourages frankly unfettered  
21 discussion among governmental workers so that the  
22 decision-makers can make informed decisions on policy matters.  
23 Because of that, those records should be made public records.

24 JUSTICE BRODERICK: So you would --

25 MR. MULLEN: As to broad, broad. Now, there are

1 other exceptions that these records also generate. For  
2 instance, the more common one is (indiscernible).

3 JUSTICE BRODERICK: Well, he says just redact it.

4 MR. MULLEN: That's why I started out with the first  
5 one that says, governmental privilege, executive privilege,  
6 special information, or whatever the privilege is you want to  
7 call it. The common law privilege that we believe applies  
8 overall in these types of meetings, the meetings and records  
9 generated by them.

10 JUSTICE BRODERICK: Would you -- and I have a  
11 question and I'll close with this. If we decide that the  
12 meetings of the superior court are open, by analogy, we would  
13 be deciding that the senior staff meetings of the attorney  
14 general's office and the senior staff meetings of the  
15 governor's office are also open.

16 MR. MULLEN: I agree with that. And if you decide  
17 that the meetings are not necessarily open but the  
18 records --

19 JUSTICE BRODERICK: Yes.

20 MR. MULLEN: -- should be produced to the public to  
21 have access to them. I think that as a policy matter, that  
22 would be a hindering effect the (indiscernible) government.  
23 You would not -- you would not -- he would find a way not to  
24 produce records, or you would have to have a chilling effect  
25 on people discussing in a frank and open manner in these

1 meetings, very aside from policy because they knew that they  
2 were recorded and their views might be produced  
3 (indiscernible) like a policy matter, I don't think would be  
4 (indiscernible).

5 JUSTICE DUGGAN: Just so I'm clear, you believe we  
6 should decide this case based on the unreasonableness of the  
7 restriction and not on the definition of governmental  
8 proceedings and records?

9 MR. MULLEN: I believe so, Your Honor. Because as I  
10 said, I firmly believe that the term governmental records is  
11 broader than some records generated by governmental  
12 proceedings. And that comes from 91-A, the document of the  
13 executive branches that aren't part of the public proceeding  
14 are still the public documents.

15 JUSTICE BRODERICK: I just want to be clear because  
16 I think Justice Duggan asked you a broader question. Is it  
17 your view that the meeting of the superior court judges,  
18 however many there were in the room, was not a governmental  
19 proceeding?

20 MR. MULLEN: Our view is that's not a governmental  
21 proceeding.

22 JUSTICE BRODERICK: All right. It may, however --  
23 the paperwork generated prior to and at or subsequent to may  
24 constitute a governmental record, but you would not turn those  
25 over because reasonable restrictions can be placed on it.

1 MR. MULLEN: That is our argument.

2 JUSTICE BRODERICK: All right.

3 MR. MULLEN: Thank you, Your Honor.

4 JUSTICE BRODERICK: Thank you.

5 Case submitted? Thank you.

6 Court will be in recess.

7 THE CLERK: All rise.

8 (Proceedings concluded)

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CERTIFICATE

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November 16, 2021